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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Forty-fifth session

SUMMARY RECORD OF THE 21st MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 17 August 1993, at 3 p.m.

Chairman: Mr. AL-KHASAWNEH

later: Mr. YIMER

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The administration of justice and the human rights of detainees:

(a) Question of the human rights of persons subjected to any form of detention or imprisonment;

(b) Question of human rights and states of emergency;

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(c) Individualization of prosecution and penalties, and repercussions of violations of human rights on families;

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The meeting was called to order at 3.15 p.m.

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES:

(a) QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT;

(b) QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY;

(c) INDIVIDUALIZATION OF PROSECUTION AND PENALTIES, AND REPERCUSSIONS OF VIOLATIONS OF HUMAN RIGHTS ON FAMILIES;

(d) THE RIGHT TO A FAIR TRIAL (agenda item 10) (continued) (E/CN.4/Sub.2/1993/19, 20, 21, 23, 24 and Add.1 and 2; E/CN.4/Sub.2/1993/NGO/2, 9, 14 and 15)

1. Mr. TREAT said that, before drafting the report on the right to a fair trial (E/CN.4/Sub.2/1993/24) which he was now presenting to the Sub-Commission, Mr. Chernichenko and himself had drawn up a preparatory report in 1990 (E/CN.4/Sub.2/1990/34) a preliminary report in 1991 (E/CN.4/Sub.2/1991/29), which had focused on interpretations of the right to a fair trial by the Human Rights Committee, a questionnaire on national practices with regard to the right to a fair trial, and a progress report in 1992 (E/CN.4/Sub.2/1992/24), which had included three addenda.

2. Addendum 1 had consisted of a study of the interpretations of international fair trial norms by the European Commission and Court of Human Rights. Addendum 2 had evaluated the interpretations of those norms by the Inter-American Commission on and Court of Human Rights and addendum 3 had consisted of a study of the right to amparo or to habeas corpus and similar procedures.

3. As they had anticipated, Mr. Chernichenko and himself would be in a position to submit their final report to the Sub-Commission in 1994. He stressed that the strong friendship that had developed between the Special Rapporteurs had greatly assisted them in accomplishing their task. He also thanked all the Governments, intergovernmental and non-governmental organizations, lawyers and individuals who had made valuable contributions to their work.

4. In the current year, the Special Rapporteurs had embarked on what was by far the most difficult stage of their study, in which they set out to examine the laws concerning and interpretations of the right to a fair trial in as many nations as possible. They had studied not only the trial process, but also pre-trial procedures and circumstances in which the trial took place. The report was neither comprehensive nor rigorously comparative: to produce a truly comprehensive study of the question would take more than a lifetime. Besides, the world was changing at such a pace that some of the data they had gathered referred to governmental systems or even countries that had since ceased to exist - at any rate, in their earlier form.

5. The report comprised five chapters. In the first, the authors summarized their previous reports. The second dealt with additional sources of fair trial norms and recent trends in the development of those norms. For example, the African Commission on Human and Peoples' Rights had adopted a resolution expanding article 7 (1) of the African Charter and guaranteeing several additional rights, including the presumption of innocence and the right to an interpreter. Chapter III concerned national practices related to the right to a fair trial. It dealt, inter alia, with the right of a detainee to receive notice of the charges against him and the right to counsel at trial. In the fourth chapter, the authors summarized the responses of 28 Governments that had answered the questionnaire addressed to them. In the final section, they offered some conclusions and recommendations aimed at providing greater protection for the right to a fair trial.

6. To that end, the Special Rapporteurs had formulated a draft third optional protocol to the International Covenant on Civil and Political Rights (see p. 32 of the report). That protocol made both the right to a fair trial and the right to a remedy non-derogable in periods of emergency. The Commission on Human Rights and the Sub-Commission had also many times expressed the view that the right to habeas corpus and to amparo should be made non-derogable. In that connection, it should be noted that, while the International Covenant on Civil and Political Rights did not specifically guarantee the right to habeas corpus or to amparo, its article 9, paragraphs 3 and 4, none the less provided the essential remedy for violations of human rights that was available through habeas corpus, amparo or similar procedures in many countries. Those articles therefore constituted the basis for the draft protocol.

7. The authors of the report and of the draft optional protocol recommended that those two documents should be sent to all Governments, to interested non-governmental organizations and to the Human Rights Committee for their comments, which could then be reflected in the final report. They also hoped that the comments made by members of the Sub-Commission would make it possible to improve the draft protocol.

8. The report had two addenda. The first (E/CN.4/Sub.2/1993/24/Add.1) contained a draft declaration on the right to a fair trial, which the Special Rapporteurs had drafted on the basis of international instruments related to the right to a fair trial, and of interpretations of that right given by various international bodies. They had also used relevant information received from the 28 Governments that had responded to the questionnaire. In addition, the assistance provided by intergovernmental and non-governmental organizations, bar associations and individuals had aided them greatly.

9. The second addendum to the report (E/CN.4/Sub.2/1993/24/Add.2) reviewed the laws and national practices relating to the right to a fair trial, with particular reference to conditions of pre-trial detention, treatment of the detainee during the trial and the right of the accused to notice of charges. While they had been unable to verify all the information submitted to them, the authors had sent that addendum to all the States mentioned therein, with a request for their comments, which would be reflected in the final report. He also pointed out that many elements of the right to a fair trial were set forth in paragraph 15 of the Vienna Declaration. He concluded by welcoming

the draft declaration on the right of habeas corpus prepared by Mr. Joinet. Thought should perhaps be given to the desirability of bringing together that declaration and the declaration on the right to a fair trial in a single document.

10. Mr. CHERNICHENKO thanked Mr. Treat for his introduction of their report and for the warm words addressed to him.

11. The CHAIRMAN requested Mr. Yimer to comment on the study prepared by Mr. Treat and Mr. Chernichenko.

12. Mr. YIMER, reminding members that his comments and observations were made pursuant to Sub-Commission resolution 1992/21, said that it was not enough simply to recognize the right to a fair trial; it must also be ensured that that right could be exercised in practice. In chapter I of their report, the Special Rapporteurs rightly stressed the importance of the institutions of habeas corpus and amparo and also of the independence of the judiciary and of practising lawyers. They should continue to devote particular attention to those issues.

13. It was not clear to him why the Special Rapporteurs referred to the fair trial norms cited in chapter II of their report as "additional norms", when in fact they were internationally recognized human rights and fundamental freedoms that had long been established in various international human rights instruments.

14. In paragraph 52, the Special Rapporteurs noted that they had collected information on trial practices in only 65 of the 183 countries that were members of the United Nations. Furthermore, that information gave only a very modest indication of trial practices in those countries.

15. In paragraph 44, the Special Rapporteurs stated that they conceived the right to a fair trial "broadly". Did that mean that one could conceive narrowly a right that was embodied in article 10 of the Universal Declaration of Human Rights and in article 14 of the International Covenant on Civil and Political Rights?

16. In paragraph 45, they stressed the very important point that it was necessary to evaluate not only proceedings in courts, but also pre-trial procedures which might affect the overall process.

17. In paragraph 48, the authors wrote that the somewhat more realistic objective they had set themselves in the study was to "highlight common characteristics and some variations in trial procedures with the aim of identifying principles which should largely be consistent with national practices and thus acceptable to Governments". In his view, it was national practice that should be consistent with established principles, and not the other way round.

18. In paragraph 50, the authors rightly recommended that further study of administrative, civil and other procedures should be undertaken. In that connection, it should be remembered that, under the terms of article 14,

paragraph 1, of the International Covenant on Civil and Political Rights, a person must be guaranteed a fair hearing not only in criminal cases, but also in civil proceedings.

19. Paragraph 57 stated that there did not appear to be a universal norm as to the appropriateness of pre-trial detention. Yet article 9, paragraph 3, of the International Covenant on Civil and Political Rights provided that "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

20. Paragraphs 59 and 60 dealt with one of the most serious and common violations of the right to a fair trial, namely, the failure of Governments to ensure that lawyers were able to consult with their clients during pre-trial detention. Furthermore, he considered, as did the authors of the report, that administrative detention often conflicted with the right to be tried without undue delay (see para. 61).

21. The report stated that the independence of judges and the right to appeal were frequently jeopardized in times of public emergency or national security crises. It should be added that those were unfortunately not the only circumstances in which those safeguards were jeopardized.

22. By way of a general comment, he found that chapter III of the report, dealing with national practices related to the right to a fair trial, was too descriptive and did not analyse the problem in sufficient depth.

23. Concerning chapter IV, which contained summaries of Government replies to the questionnaire, it should once again be pointed out that what was important was not what Governments said about their laws, but the extent to which those laws were applied. In paragraph 78, the authors stated that they had found Governments' policy statements to be useful for elaborating a draft declaration on the right to a fair trial and remedy. He himself considered that such a draft should have a much broader basis.

24. In chapter V, the authors recommended the development of a third optional protocol to the International Covenant on Civil and Political Rights, aiming at guaranteeing under all circumstances the right to a fair trial and a remedy, and making non-derogable the right to a fair trial guaranteed by article 9, paragraphs 3 and 4, and article 14 of the Covenant. While he favoured the idea of a third optional protocol, he none the less thought that a declaration on the right to a fair trial was not necessary inasmuch as all the principles it would embody already appeared in human rights instruments. What was needed was to ensure that the existing norms were applied scrupulously. Lastly, he failed to grasp the relationship between the right to a fair trial and the death penalty. It was quite conceivable that a person might be sentenced to death after a fair trial. He concluded by expressing the hope that his comments would assist the Special Rapporteurs in completing their work.

25. Mr. JOINET welcomed the report of Mr. Chernichenko and Mr. Treat, which marked an important stage in the history of the Sub-Commission's work. With regard to the notion of the inviolability of habeas corpus, he had doubts as to the desirability of envisaging the direct adoption of a protocol, without first adopting a declaration. He did not share Mr. Treat's view that it would be possible to dispense with the declaration in order to come up with the text of a treaty more rapidly; the value of a prior declaration - which made it possible to accustom people to the idea of a convention, to reconcile positions without the need for a commitment, and to identify more clearly the practical problems that would arise during the drafting of the final instrument - seemed to him undeniable and, in support of his position, he cited the example of the Convention against Torture, adding that, if, as he hoped, a convention on disappearance one day came into being, the Declaration on the Protection of All Persons from Enforced Disappearance would have hastened that outcome. He was convinced that, as a general principle, a draft protocol, regardless of its quality, should always be preceded by a declaration.

26. He also informed the members that important changes had taken place in the criminal procedure in France, one example being that the presence of a lawyer was now obligatory during the period of police custody. He had used the 1992 progress report of Mr. Chernichenko and Mr. Treat to bring their views to the attention of the experts who had worked on that reform. He also pointed out that that report had been extremely useful to him in his work, in collaboration with Mr. Guissé, on the question of impunity, as well as to the Working Group on Arbitrary Detention in its consideration of the question of fair trials. He thus considered that that work, which was of a very high quality, deserved to be very widely disseminated, even beyond the confines of the United Nations.

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED (agenda item 4) (continued) (E/CN.4/Sub.2/1993/6, 7, 8, 9 and 10; A/CONF.157/23)

27. Mr. van BOVEN, introducing his final report concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms (E/CN.4/Sub.2/1993/8), which was to be read in conjunction with his preliminary report (E/CN.4/Sub.2/1990/10) and his two progress reports (E/CN.4/Sub.2/1991/7 and E/CN.4/Sub.2/1992/8) and with the report of the Maastricht Seminar on the subject, said that his mandate had consisted, inter alia, of drawing up some fundamental principles and guidelines, which were contained in chapter IX of the report.

28. With regard to the concept of gross violations of human rights, he drew attention to the working paper by Mr. Chernichenko (E/CN.4/Sub.2/1993/10), whose approach was similar to his own, noting that, as a strict minimum, the concept covered genocide, slavery and slavery-like practices, summary or arbitrary executions, torture and cruel, inhuman or degrading treatment or punishment, enforced disappearance, arbitrary detention, deportation or forcible transfer of population and, lastly, systematic discrimination, especially on grounds of race or sex.

29. In that connection, he drew particular attention to the measures needed to protect and, where necessary, compensate and rehabilitate women whose rights were not respected, citing the draft Declaration on the Elimination of Violence against Women and General Recommendation No. 19 on Violence against Women, adopted by the Committee on the Elimination of Discrimination against Women.

30. The question of contemporary forms of slavery was another issue that merited special attention. He referred to the work of the Working Group of the Sub-Commission on Contemporary Forms of Slavery and said that he had tried to respond to certain issues raised by the Working Group; he referred particularly to paragraphs 23 to 25 of his report. The question was of particular topical relevance, especially where slavery and slavery-like practices in wartime were concerned; and in that context he again referred to the fate of women, vehemently denouncing practices of systematic rape, sexual slavery and the humiliation to which women and girls were subjected in situations of armed conflict. He had also received a huge amount of material dealing with the so-called comfort women. He urged the Sub-Commission actively to pursue those issues in the light of the urgent need for those victims to receive justice.

31. Turning to existing international norms, the subject of chapter II of his report, he said that the right to reparation had a basis in many international and regional human rights instruments, in norms in the area of crime prevention and criminal justice and in the norms of international humanitarian law. In that connection, he drew attention to recommendation No. 5 contained in paragraph 136 of his report, to the effect that new instruments on human rights should include provisions on reparation and that consideration might even be given to amending existing instruments in that regard.

32. As far as State responsibility (chap. III) was concerned, he had relied quite heavily on work being carried out by the International Law Commission. He noted, however, that the Commission viewed its work mainly in the context of traditional international law, which was the law of inter-State relations, whereas, in the context of human rights, State responsibility existed vis-à-vis individuals. Hence the importance of recommendation No. 9 (para. 136), which requested that more attention should be given to the obligation of States to respect the human rights and fundamental freedoms of all persons under their jurisdiction. He also drew attention to the draft articles of the International Law Commission on cessation of wrongful conduct, reparation, restitution, compensation and guarantees of non-repetition, which he had used in preparing basic principles and guidelines (para. 137).

33. In his view, chapter IV dealing with decisions and views of international human rights organs was one of the most important chapters in the report. It analysed the case-law of various organs and, in particular, of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Commission of Inquiry established under the Constitution of the International Labour Organisation (he cited ILO Convention No. 111 in the context of the complaint against Romania), the European Court of Human Rights and the Inter-American Court of Human Rights.

He drew attention to recommendation No. 7 in paragraph 136, which requested treaty-monitoring bodies to pay systematic attention to the question of reparation for victims of violations of human rights, and to general principle No. 2 in paragraph 137, according to which the State had a duty to make reparation in case of a breach of the obligation to respect human rights and fundamental freedoms.

34. The subject of chapter V of the report was compensation to victims of gross violations of human rights and fundamental freedoms resulting from the unlawful invasion and occupation of Kuwait by Iraq. Without detailing the arrangements made, he thought that they might serve as an interesting precedent in the context of the United Nations. In the light of the progressive development of international human rights law and the granting of locus standi to individuals before international forums, he considered it of cardinal importance that victims should be able to present their claims on their own behalf and should not have to rely on the goodwill of Governments. In that context, recommendations Nos. 12 and 13 in paragraph 136 were of particular importance: the former recommended that victims, or their families, must have access to national and international recourse procedures while the latter recommended that States seeking compensation for victims should use those resources for the benefit of the victims.

35. National law and practice were dealt with in chapter VI of the report, which was illustrative rather than exhaustive. He noted, however, that large categories of victims of gross violations of human rights were denied reparation as a result of specific provisions of national laws or because of the manner in which those laws were applied. In particular, he referred to limitations in time, restrictions in the definition of the scope and nature of the violations, the failure on the part of the authorities to acknowledge certain types of serious violations, the operation of amnesty laws, the restrictive attitude of the courts, the inability of certain groups to present and pursue their claims and the lack of financial resources - factors which, separately or jointly, violated the principle of equality of rights. The basic principles and guidelines dealing with procedures and mechanisms (Nos. 12 to 20 in para. 137 of the report) were particularly relevant in that context.

36. With regard to chapter VII of his report, which dealt with the issue of impunity in the context of the right to reparation, he referred to the study carried out by Mr. Guissé and Mr. Joinet. Where impunity had been sanctioned by the State, it was no longer possible for the victims of human rights violations to request reparation. In fact, once the State authorities had failed to investigate the facts and to establish criminal responsibility, it became very difficult for victims to turn to the courts in order to obtain reparation. In a social and political climate where impunity prevailed, the right to reparation for victims of gross violations of human rights and fundamental freedoms became illusory. Principle No. 5 in paragraph 137 was particularly applicable in that regard, in that it stated that impunity was in conflict with the duty to prosecute and punish perpetrators of gross violations of human rights.

37. In his final remarks, contained in chapter VIII of the report, he again stressed the irreparable nature of gross violations of human rights and fundamental freedoms. In such instances, no remedy or redress could be proportional to the injury inflicted. It was nevertheless an imperative norm of justice that wrongs should be redressed to the fullest possible extent. Revelation of the truth and establishment of responsibility were the first stage in reparation. Compensation in the form of financial awards was by no means the only type of reparation. He also stressed the importance of the preventive approach; prevention of the recurrence of violations of human rights and the creation of conditions conducive to ensuring that violations did not recur were a fundamental obligation under human rights law.

38. Chapter IX of his report was devoted to the basic principles and guidelines he had been mandated to draft. He hoped that the Sub-Commission would examine them, with a view to their eventual adoption by the United Nations as a whole. That was the purpose of recommendation No. 4 (para. 136), to the effect that the United Nations, during the Decade of International Law, should give priority attention to adopting a set of principles and guidelines to give content to the right to reparation for victims of gross violations of human rights and fundamental freedoms.

39. The CHAIRMAN said that it was justifiable to affirm that the work of the International Law Commission on the question of State responsibility could be regarded as a model in that field. One aspect of that work, which dealt with the so-called instrumental consequences of internationally wrongful acts, had a direct bearing on the question of the relationship between State responsibility and human rights. It was important to specify that instrumental consequences or, to use another term, countermeasures, were governed by the criterion of proportionality and that some actions, such as reprisals, were absolutely prohibited if basic human rights and fundamental freedoms were likely to be affected as a result. The Sub-Commission should be informed of the views of the International Law Commission on that question.

40. Mr. CHERNICHENKO expressed his deep gratitude to Mr. van Boven for the remarkable work he had done on the question of compensation for victims of violations of human rights. It was a question in which he himself took a close interest and he had already had occasion to say that Mr. van Boven had invited him to take part in the Maastricht Seminar referred to in his study. The Special Rapporteur's proposals and recommendations were extremely detailed, but he thought that one might go further still: Mr. van Boven's study focused on gross violations of human rights, with the word "gross" taken to mean "massive", as could be seen from paragraphs 8 to 13 of the report. That posed a problem, for the essential criterion where reparation was concerned should not be the extent of the violation, but its nature. That was a question on which further reflection was perhaps needed. The question of State responsibility also raised a complex problem, for it might legitimately be asked whether it was always the State that had the obligation to compensate victims of violations. What was undoubtedly the duty of the State was to adopt the necessary laws on the matter; actual compensation and rehabilitation could then be provided to the victims by other bodies such as insurance companies or humanitarian associations. It might perhaps be useful to define, at national level, the offences that could be described as gross violations

of human rights. National criminal codes could thus contain indications regarding the types of civil and criminal offence constituting such violations, thereby facilitating compensation of the victims. Perhaps that was a Utopian idea that would not easily gain acceptance, but it was none the less one that deserved consideration.

41. With regard to impunity, Mr. van Boven had been right not to dwell unduly on that point, since the question was the subject of a study by other experts. The basic principles and guidelines he had proposed at the end of his study were extremely sound and might even be used in a draft declaration on the question. He thus suggested that the Sub-Commission should adopt a draft resolution recommending the formulation of a draft declaration based on those principles, in which the ideas he had just expressed might perhaps find a place.

42. Mr. JOINET welcomed the emphasis placed by Mr. van Boven in his study on the close link between the right to reparation for victims of gross violations of human rights and action to combat impunity. He drew attention to the important role that the victims' organizational capacity must play if they wished to obtain reparation. A striking example had been provided by the organizations of victims' families in Latin America, such as the Latin-American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), which had been at the origin of the debate on action to combat impunity and the right to reparation. It should also be stressed that, in some countries, such as those of Eastern Europe, the victims of violations were in a sense seeking political rehabilitation. They wished first and foremost to be recognized as sensible individuals who had defended a political cause and had been neither common criminals nor, in the case of those who had been interned in psychiatric hospitals, mentally ill. Reparation also included a financial component, and it was indispensable to set timetables for the compensation of victims so that no State could say that the burden on its budget was too heavy. Lastly, he was not sure that it was any more difficult for victims to obtain reparation when there had been no criminal trial, for compensation of the victims was very often one of the tactics adopted by some Governments with the specific purpose of avoiding criminal proceedings. That being said, he congratulated Mr. van Boven on his exhaustive study and assured him that he would certainly take account of his comments and proposals in the final report on the question of impunity.

43. Mr. GUISSE said that the reports on the right to a fair trial, the question of impunity and the right to reparation for victims of human rights violations were complementary, for, in each of the three, the objective sought was reparation for the injury caused. Unlike Mr. Chernichenko, he considered that, in the first instance, it was the responsibility of States to make reparation, for they were obliged to protect human rights and must be the first to be called to account when those rights were violated. It was thus necessary to insist on that principle. In his view, it was also very important to grant reparation to the victims on a professional as well as a civil plane, in the form of reinstatement or supplementary allowances. Lastly, a civil action would make it possible to sanction "relative" violations of human rights, namely, those which, while they did not justify initiating criminal proceedings, might be brought to the attention of a civil

court with a view to securing compensation for the victims. He hoped that account would be taken of his comments in the decision to be taken by the Sub-Commission concerning Mr. van Boven's study.

44. Mrs. ATTAH congratulated Mr. van Boven on his excellent report, which deserved the widest possible circulation and should therefore be transmitted to the Commission on Human Rights. She wished in particular to thank him for stressing, in paragraphs 23 to 25, the need to grant reparation to victims of the slave trade and of other early forms of slavery, and to link that question with the right to development.

45. Mr. KAI (Observer for Japan) congratulated Mr. van Boven on his extensive study on the right to reparation for victims of gross violations of human rights and fundamental freedoms. In that connection, he wished to inform the Sub-Commission of the position of the Government of Japan on the issue of "comfort women", to which reference had been made several times in the course of the deliberations. On 4 August 1993, his Government had been able to announce the findings of an extensive study conducted since December 1991 covering all factual aspects of that issue, and contained in a document that would be distributed to the members of the Sub-Commission. It was clear from that inquiry that the Japanese military had been directly or indirectly involved in the establishment and management of comfort stations and in the transfer of "comfort women", who had generally been recruited against their will by private individuals acting at the request of the military or sometimes even directly by military personnel. For the most part, those women had been from the Korean Peninsula, which at the time had been under Japanese rule. In recent years, the Government of Japan had done its utmost to shed light on those events. Several relevant ministries and public agencies had taken part in the study and all materials that might be of relevance to the question had been closely examined: both pre-war and post-war diplomatic documents, documents relating to the allied forces in Japan in the early post-war period preserved in the National Archives and the National Diet Library and documents concerning the Allied Translator and Interpreter Section preserved in the United States National Archives. The process of finding and studying the relevant documents had been extremely time-consuming and painstaking, but had resulted in the identification of 236 essential documents relating to the subject of the study. More recently, from 26 to 30 July 1993, the Government of Japan had sent a mission to the Republic of Korea to conduct individual hearings with former "comfort women", former Japanese military personnel or former officials of the Government-General of Korea, operators of comfort stations, residents in the areas where comfort stations had been located, and historical researchers. Other sources of information on which the Government of Japan had drawn included the report of the Government of the Republic of Korea, as well as testimonies compiled by organizations such as the Association of Pacific War Victims and Bereaved Families in Korea, the Korean Council for the Women Drafted for Sexual Slavery by Japan, other organizations in the Philippines and Taiwan and all of the Japanese publications on the subject. It was clear from all that research that many women's honour and dignity had been severely injured, with the involvement of the military authorities of the day. The Government of Japan extended its sincere apologies and regrets to all those, irrespective of their place of origin, who had suffered those incurable wounds. Japan was ready to face the facts and would not seek to evade them. It was firmly determined never to repeat the

same mistakes and would learn a lesson from history. The Government of Japan would also continue to pay full attention to that matter, including any other private research undertaken on the question.

46. Mr. Yimer took the Chair.

47. Mrs. KSENTINI, referring to the preceding item and the report prepared by Mr. Chernichenko and Mr. Treat (E/CN.4/Sub.2/1993/24), questioned the need to draft a third optional protocol to the International Covenant on Civil and Political Rights. The right to a fair trial was an inviolable right which there was no need to reaffirm. Furthermore, how was such a third protocol to be reconciled with the existing protocols?

48. She supported the general principles proposed in the report of Mr. van Boven (E/CN.4/Sub.2/1993/8). She would, however, have appreciated fuller consideration of the question of reparation in the case of violations of the right to a healthy environment. Similarly, on the question of prevention, she wondered whether it would not be possible to consider reparation when, by failing to take preventive measures, the competent authorities rendered themselves responsible for damage to the environment. That was a somewhat futuristic point of view, but the question was an important one.

49. She welcomed the fact that Mr. van Boven's report gave special consideration to the question of reparation for injury caused as a result of slavery and colonization. She considered, however, that the concept of a moral duty of reparation in the context of the right to development - a concept that was not universally accepted - should have been kept separate from the concept of the right to reparation for injury caused as a result of slavery and colonization, which was universally accepted. She hoped that the proposals formulated in the report would also be taken into consideration where that question was concerned.

50. Mrs. WARZAZI said that, on the basis of the studies already conducted, particularly by UNDP and the World Bank, it might be worthwhile to analyse the impact of colonization and slavery on the economy, human rights, traditions and progress of the populations that had been the victims of those practices. In the light of that analysis, it would be possible to determine how to make reparation for the injury suffered. Mr. van Boven might perhaps then suggest in his report that cancellation of the external debt of the peoples who had suffered from colonialism and slavery would be appropriate reparation. That proposal had already been made, inter alia, at a meeting of the Organization of African Unity held in Nigeria three years previously. Some Algerian intellectuals had also envisaged such a possibility.

51. Mr. JOINET, introducing the progress report on the question of the impunity of perpetrators of human rights violations (E/CN.4/Sub.2/1993/6), which he had prepared jointly with Mr. Guissé, said that the Special Rapporteurs had essentially worked on the basis of special thematic and country reports and the copious and rich documentation compiled on the occasion of the International Meeting Concerning Impunity held in Geneva in November 1992. In order to define the scope of the study, the authors had adopted three criteria. First, it covered only impunity for serious and

massive violations having a systematic character, and not isolated or non-premeditated actions. Secondly, it covered only serious violations committed by the State or its agents, either directly or indirectly. That point should be discussed by the Sub-Commission: should the study be extended, in the final text, to cover categories of non-State violations? Two arguments supported such an approach: first, the absence of a State (Somalia) or the weakening of the State (Bosnia and Herzegovina) could facilitate the perpetration of atrocities or acts of barbarism not initiated by the State. Secondly, in certain armed struggles, serious violations might be committed by belligerents (national liberation movements, guerrilla movements, etc.). Lastly, the third criterion also deserved careful thought: should the study cover impunity of perpetrators of serious violations of economic and social rights, which were not explicitly referred to in Sub-Commission resolution 1992/23? The Special Rapporteurs considered that it would be prudent to opt for a two-stage study, of which the current report would be the first part, to be followed, after the final report, by a second part dealing with perpetrators of violations of economic and social rights. That question was an important one and, although it had been widely studied from the standpoint of the right to development, it had rarely been approached from the standpoint of action to combat impunity. There was an obvious link between tyranny and corruption, violations of human rights and economic and financial embezzlement for personal ends. Duvalier, Marcos, Noriega and Stroessner were cases in point. Lastly, it would be necessary to study the extent to which action to combat impunity in the area of economic and social rights, which were relative and evolutive, could be based on a penal approach, which involved strict interpretation, and whether consideration should be given to other types of penalty. The debate also remained open with regard to serious violations committed as a result of institutional initiatives; in that regard, the question of external debt and the International Monetary Fund was still unresolved.

52. The report dealt with the question of the contribution of organizations of victims to the development or even the creation of international norms and mechanisms in the fight against impunity. Three important stages in that fight had been analysed in paragraphs 15 to 28 of the study, namely: the contribution of the courts of opinion that had their origin in the Russell Tribunal; recourse by victims' NGOs to international bodies, to which they submitted specific cases; and the increased capacity of victims to organize themselves, as attested, for example, by the influence of an NGO such as FEDEFAM. The report examined the mechanisms of de facto impunity brought into play at the different stages in the procedure; impunity resulting from the dysfunction of the institutions concerned, which was either directly or indirectly encouraged, or even organized by the authorities; and the mechanisms of impunity through operation of the law, a method which involved giving impunity a legal façade, by promulgating ad hoc laws or by diverting existing laws from their purpose, for example, by resorting to clemency measures or rules of ordinary law, such as prescription or mitigating circumstances. It was precisely to combat such manipulation of the rules that NGOs were demanding, first, that the most serious violations should be classified as crimes against humanity, in order that they should become imprescriptible by nature - or at any rate that some of those crimes, because of the circumstances of the offence (abduction, enforced disappearance, etc.), should be specifically classified as crimes whose starting point was deemed to

be not the day on which the acts had been committed, but the day on which the person had been released or the disappearance elucidated. Secondly, NGOs were demanding that, in accordance with article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, due obedience should not be invoked in the case of such crimes.

53. With regard to States' awareness of their responsibilities in human rights violations, experience had shown that any country might, at some point or other in its history, be confronted with that evil. The argument that impunity was inversely proportional to the level of genuine democracy needed to be put into perspective; it failed to take account of the historical dimension of the phenomenon by disregarding, for example, the atrocities committed by numerous west European countries during the colonial wars - atrocities which in almost all cases had gone unpunished. Furthermore, the collapse of many dictatorial or totalitarian regimes showed that mechanisms of massive violations were neither unavoidable nor attributable to a form of incompetence, but the expression of a deliberately planned and implemented policy and that, as such, they were reversible.

54. Nor must one overlook the contradictions between the need for justice, the requirements of collective memory and the political constraints of reconciliation. Those contradictions emerged when the oppressed, freed from their chains, went on to take over State responsibilities and subsequently found themselves enmeshed in the process of national reconciliation, which tempered their initial commitment with regard to impunity, while the conflict between victims and their oppressors remained acute. However, the courts must intervene not only in order to satisfy the need for justice inherent in human dignity, but also in a preventive capacity: oppressors must be aware that sooner or later they were liable to be called to account. The response to that need for justice could take on several often complementary forms, in which the national courts and national commissions set up for investigations and to establish the truth played a very important role, with international jurisdictions intervening only in accordance with the principle of subsidiarity. In that connection, in the context of international jurisdictions, the Sub-Commission might perhaps be interested in paragraphs 79 and 82 of the report, which argued in favour of the trial <u>in absentia</u> (contumacious judgement) procedure, a solution which, to the great regret of the Special Rapporteurs, had not been adopted, as a result of the influence of the English legal system. That omission, which constituted an obvious encouragement of impunity, was all the more regrettable since the European Court of Human Rights had sanctioned the procedure in view of the fact that, in the case of subsequent arrest, the person would undergo a full and fair retrial. It was also indispensable to take action against impunity in order to respond to the requirements of collective memory and combat revisionism. In that regard, the Special Rapporteurs particularly drew the attention of the Sub-Commission to paragraphs 92 to 101 of the report, which dealt with the role of the records of places of detention and the files of the intelligence and political police departments.

55. Lastly, the authors had preferred not to evade the question of purges in the event of a return to democracy, which posed obvious risks of infringement of civil and political rights and which must be carried out in compliance with minimum guarantees. The question was a sensitive one, since, in such a

situation, there was a complete upheaval within the State apparatus and a reorganization of the administration. There must thus be procedures enabling all persons implicated to assert their rights.

56. Mr. Al-Khasawneh resumed the Chair.

57. Mr. ALAEE (Observer for the Islamic Republic of Iran), speaking in exercise of the right of reply, said that the Salman Rushdie affair did not relate to the Government of Iran, but to the whole Muslim world. During the eighteenth Islamic Conference of Foreign Ministers in Riyadh, Saudi Arabia, the Islamic countries had strongly condemned the blasphemous book The Satanic Verses, whose author they regarded as an apostate. Furthermore, under the terms of article 19, paragraph 3, of the International Covenant on Civil and Political Rights - which stipulated that the exercise of freedom of expression could be subject to certain restrictions, but only such as were provided by law and were necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order, or of public health or morals - the book had violated the limits to freedom of expression. Moreover, its publication had resulted in the death of many innocent people whose religious sentiments had been disregarded. The author and all those who had supported him must be held responsible for the tragic events that had taken place in various towns. The reactions by Muslim nations to the publication of the book could not be blamed on the Islamic Republic of Iran.

58. He considered that all allegations with regard to the assassination of hundreds of persons outside Iran were politically motivated. He referred to the verdict of a Swiss court on the death of Kazem Rajavi, which had concluded that "in the absence of a sentence by a trial authority, such an accusation, which is extremely serious, cannot be held to be true". His delegation was nevertheless ready to cooperate with the Sub-Commission in the further clarification of those accusations.

The meeting rose at 6.10 p.m.